

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

VIVIAN TRAN,
Plaintiff and Appellant,
v.
HOA THI PHAM,
Defendant and Respondent.

A123668

**(San Francisco County
Super. Ct. No. FDV-08-806347)**

Appellant Vivian Tran petitioned for a temporary restraining order (TRO) against her mother-in-law, respondent Hoa Thi Pham. Following a hearing, the trial court denied the TRO petition and ordered appellant to pay \$900 in attorney fees. On appeal, appellant contends the court violated her due process rights by failing to give her an opportunity to testify at the hearing on the TRO petition. She also argues the award of attorney fees must be overturned because: (1) the court erred by failing to consider her ability to pay; and (2) the award includes fees for services rendered by respondent's counsel in a separate matter. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 15, 2008, appellant filed a petition for a TRO (Judicial Council Form DV-100) seeking to prohibit respondent, her mother-in-law, from harassing or threatening her. The TRO petition also sought to prohibit respondent from coming within

100 yards of appellant, appellant's husband, Nam Nguyen, and appellant's son.¹ Appellant alleged she and Nguyen lived in respondent's basement. Appellant claimed respondent was "cruel" and "ruthless" and routinely abused and harassed her and her husband. Appellant also claimed respondent had Nguyen arrested and forced her and her family to move out of respondent's house.

In her answer, respondent denied being violent or abusive. She claimed *she* had been abused by appellant and Nguyen. She also noted that she had filed her own TRO petition against Nguyen and alleged appellant's TRO petition was "retaliatory."² Respondent sought \$900 in attorney fees for the time her attorney spent responding to appellant's TRO petition. She supported her attorney fee request with an income and expense declaration showing she had no income.

Appellant and Nguyen appeared at the hearing. At the outset of the hearing, the court swore in appellant and Nguyen.³ It also swore in respondent and her son. The

¹ On March 12, 2009, we returned appellant's opening brief to her because it failed to cite to the appellate record in violation of California Rules of Court, rule 8.204(a)(1)(C) [each brief must "[s]upport any reference to a matter in the record by a citation to the volume where the matter appears"]; see also Cal. Rules of Court, rule 8.204(e)(1).) On March 13, 2009, appellant filed a second opening brief which — like her first brief — did not adequately cite to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).) We have the discretion to disregard contentions unsupported by citations to the record. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16; see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 ["It is the duty of counsel to refer us to the portion of the record supporting his [or her] contentions on appeal"].) Although we are hampered by appellant's inability to comply with the rules of court, we decline to disregard her contentions. Instead, "we do not accept [her] factual assertions and rely instead on respondent's statement of facts, which is supported by appropriate record references." (*Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 424 & fn. 1.)

² In August 2008, respondent sought a TRO prohibiting Nguyen from harassing or threatening her and requiring him to stay 100 yards away from her.

³ The court provided an interpreter for the parties.

court then stated it had read and considered the moving papers and the answer. It asked appellant, “is there anything in addition that you wanted to tell me under oath?” Nguyen responded by stating he and appellant would “respond to whatever” respondent said. Counsel for respondent argued there was nothing in appellant’s request “to support her immediate fear that [respondent] is going to do something to [appellant] or to her family.” The court then asked whether there was “any additional testimony” it should hear; in response, one of respondent’s sons testified the allegations in appellant’s TRO petition were “all lies.”

The court asked respondent’s counsel about the request for attorney fees to verify the fees sought were incurred in connection with the matter before the court. The court inquired, “Did those attorneys’ fees relate to the other matter that is being filed on behalf of the respondent?” Counsel for respondent assured the court the request for fees pertained “to just the answer because we had to use an interpreter and prepare an answer specifically for this hearing. . . . [T]hose costs reflect this hearing and preparing a response in defense to that.”

At that point, the court asked appellant: “[I]s [there] anything in addition . . . you would like to tell me under oath regarding your request in response to what you have read in the answer to the restraining order[?]” Appellant did not respond. Nguyen, however, disputed some of the allegations in the answer and introduced a letter written by an employee of a shelter appellant had visited. Nguyen contended the letter proved respondent had abused appellant and had forced her to move out “without [a] reason.” The court then asked appellant whether she or Nguyen had any additional documents and whether there was “[a]nything else” they wanted to tell the court. As before, appellant did not respond; Nguyen told the court he had nothing further to present.

At the conclusion of the hearing, the court denied appellant’s TRO petition, concluding appellant had not met her burden of proof. The court awarded respondent \$900 in attorney fees. Appellant timely appealed.

DISCUSSION

Appellant's Due Process Claim Fails Because the Court Offered Appellant Multiple Opportunities to be Heard at the TRO Hearing

Appellant contends the court violated her due process rights by denying her TRO petition “without hearing directly from” her at the hearing on the petition. We disagree. The court offered appellant several opportunities to testify at the TRO hearing. At the outset of the hearing, the court swore in appellant and asked her, “[I]s there anything . . . that you wanted to tell me under oath?” Later, the court asked appellant: “[I]s there anything . . . you would like to tell me under oath regarding your request in response to what you have read in the answer to the restraining order?” The court also asked appellant whether she or Nguyen had any additional documents to show the court and whether there was “anything else” they wanted to tell the court. Each time, appellant declined to speak. The court gave appellant a “full and fair opportunity to be heard on the merits” of the TRO petition. (See, e.g., *Biosense Webster, Inc. v. Superior Court* (2006) 135 Cal.App.4th 827, 835 [court invited counsel for the party opposing the TRO to “stress anything that you wish to stress”].) Contrary to appellant’s suggestion, the court had no obligation to force her to testify at the TRO hearing.

Appellant’s reliance on *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 485 (*Reifler*) does not assist her. In that case, the appellate court concluded trial courts have discretion to exclude oral testimony in marital dissolution matters but cautioned courts to exercise discretion and to “hear testimony or permit cross-examination of a declarant” in certain situations. (*Id.* at p. 485.) *Reifler* has no application here for the obvious reason that the court here did not exclude oral testimony. To the contrary, the court repeatedly invited appellant to testify and appellant rejected those invitations.

Accordingly, appellant has not demonstrated the court violated her due process rights or that it abused its discretion by denying her request for a TRO.

The Court Properly Awarded Attorney Fees to Respondent

Appellant’s next complaint concerns the award of attorney fees. She contends Family Code sections 270 and 6344 require a trial court to determine whether a party has

the ability to pay when awarding attorney fees.⁴ Appellant, however, has forfeited this argument by failing to raise it in the trial court. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264; *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948-949 [“[T]o preserve an issue for appeal, a party ordinarily must raise the objection in the trial court.”] At the hearing on her TRO petition, appellant did not contend she was unable to pay respondent’s attorney fees, nor did she offer any evidence concerning her financial situation or demonstrating her inability to pay.

Even if we assume for the sake of argument that the court failed to consider appellant’s ability to pay *and* that appellant preserved the issue for appeal, we would conclude appellant has not demonstrated the award of attorney fees was an abuse of discretion. *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1204 (*Villanueva*) is instructive. There, the trial court awarded nearly \$40,000 in attorney fees to the City of Colton pursuant to the Fair Employment and Housing Act (FEHA) after the City prevailed in a frivolous employment discrimination action. (*Id.* at pp. 1191, 1200.) On appeal, the plaintiff claimed the court “failed to take into account his inability to pay such a sizable sum.” (*Id.* at p. 1191.) The appellate court rejected this argument. It explained the plaintiff “offered no evidence of any kind which might have warranted a reduced fee award. Indeed, in responding to the City’s request, he easily could have offered a declaration setting forth his gross income, his net income, his monthly expenses, his assets, or any other information which he thought would lend support to his position. He failed to do so. Thus, while we are confident that a trial court has an obligation to

⁴ Pursuant to Family Code section 270: “If a court orders a party to pay attorney’s fees or costs under [the Family] code, the court shall first determine that the party has or is reasonably likely to have the ability to pay.” Family Code section 6344, subdivision (b) provides in relevant part: “In any action in which the petitioner is the prevailing party and cannot afford to pay for the attorney’s fees and costs, the court shall, if appropriate based on the parties’ respective abilities to pay, order that the respondent pay petitioner’s attorney’s fees and costs for commencing and maintaining the proceeding.” Family Code section 6344, subdivision (b) does not apply here because appellant was not the prevailing party in the court below.

consider a losing party's financial status before assessing attorney fees under the FEHA, on the record before us we are unable to say that the court's fee award was an abuse of discretion." (*Id.* at p. 1204.)

Although *Villanueva* concerned a FEHA attorney fee award, the court's rationale applies with equal force here. Pham's answer to the TRO petition included an income and expense declaration, which alerted appellant to a form of proof she could have utilized to demonstrate her inability to pay. Appellant, like the plaintiff in *Villanueva*, could have offered a declaration setting forth her income, monthly expenses, assets, or any other information she thought would demonstrate her inability to pay the attorney fee award. Alternatively, she could have explained, at the TRO hearing why she was unable to pay an attorney fee award. She did not. As a result — and like the *Villanueva* court — "we are unable to say that the court's fee award was an abuse of discretion." (*Villanueva*, *supra*, 160 Cal.App.4th at p. 1204.)

Finally, appellant contends the award of attorney fees "impermissibly included an amount or sum for services rendered by respondent's counsel in a separate, though related, case in which respondent is petitioner who seeks a restraining order against her son." She does not support this argument with a citation to any legal authority or evidence from the record. As such, appellant has not demonstrated the court abused its discretion by awarding respondent \$900 in attorney fees, particularly where counsel for respondent stated at the hearing that the attorney fees were incurred to hire an interpreter, prepare a response and attend the hearing on appellant's TRO petition.

DISPOSITION

The order denying appellant's TRO petition and awarding attorney fees to respondent is affirmed. Respondent is to recover her costs on appeal.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.